

No. 20-10936

**In the
United States Court of Appeals
for the Fifth Circuit**

Jim S. Adler, P.C.; Jim Adler,
Plaintiffs-Appellants,

v.

**McNeil Consultants, L.L.C., doing business as Accident Injury Legal
Center; Lauren Von McNeil; Quintessa Marketing, L.L.C., doing
business as Accident Injury Legal Center,**
Defendants-Appellees.

**Appeal from the United States District Court
for the Northern District of Texas**
Honorable Ed Kinkeade, U.S. District Judge

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The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir. R. 28.2.1 have an interest in the outcome of this case. Those representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Statement Regarding Oral Argument

The relevant law is well-settled. The deficiencies of Appellants' pleading are apparent. Oral argument is not needed to resolve this appeal.

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Abbreviations and Record References

“Adler” refers to Plaintiffs-Appellants Jim S. Adler, P.C. and Jim Adler, collectively.

“The Adler Firm” refers to Jim S. Adler, P.C.

“McNeil” refers to the Defendants-Appellees, collectively.

Issues Presented

The overarching question in this appeal is whether Adler stated a viable Lanham Act claim for trademark infringement and unfair competition. That question, in turn, presents these issues:

1. *Search term purchases.* It is well-settled in this Circuit, and nationally, that the mere purchase of branded keywords to generate online advertisements does not violate the Lanham Act. Does this line of authority foreclose Adler’s claims in this case?

2. *Generic terms.* It is undisputed that McNeil did not place any search engine ads that displayed Adler’s trademarks. The ads contained only generic terms that, by Adler’s own admission, describe any personal injury firm. Did Adler fail to state a viable infringement claim about ads that only contained generic terms and not his trademarks?

3. *Digits of confusion.* After the district court concluded that Adler had failed to state a claim, was it still required to conduct an unnecessary “digits-of-confusion” analysis about that meritless claim?

4. *Amendment.* Did the trial court abuse its discretion in denying Adler's motion for leave to amend?

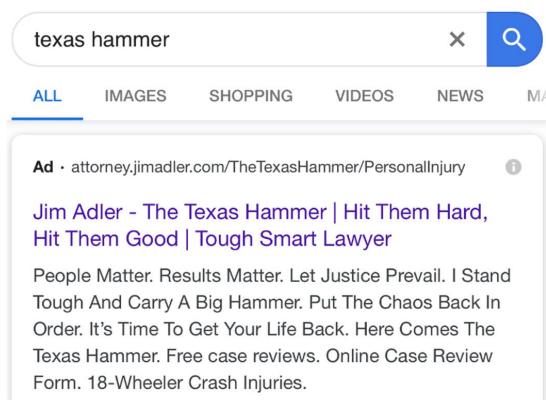
Statement of the Case

A. Factual background

Jim Adler and the Adler Firm (collectively, “Adler”) were among the first lawyers and law firms to advertise extensively after the Supreme Court upheld the right of lawyers to advertise in 1977. (ROA.86-ROA.87.) Adler has used several trademarks in its advertising, including JIM ADLER, THE HAMMER, THE TEXAS HAMMER, and EL MARTILLO TEJANO (collectively, the “Adler Marks”). (ROA.88 ¶19.) The Adler Marks are registered with the U.S. Patent and Trademark Office. (ROA.88 ¶22.)

Adler’s current advertising strategy includes the purchase of “keywords,” through Google’s search engine, to generate advertisements designed to drive internet traffic to the Adler Firm’s website. (ROA.91-ROA.92.) An advertiser who buys a keyword is paying to reserve a particular word or phrase—called a keyword—that would trigger the display of its ad if that term came up in response to a Google search. *See, e.g., 1-800-Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1235-36 (10th Cir. 2013) (describing the “mechanics of Internet advertising through search engines”).

For example, Adler buys keywords for the phrases “Jim Adler” or “Texas Hammer,” as well as the phrase “car accident lawyer” for more generic searches. (ROA.91 ¶37.) Those keywords generate search-engine ads that prominently include the Adler Marks and clearly identify the Adler Firm as the source of the advertisement, as shown in this example:



(ROA.92 ¶38.)

Appellee Lauren Von McNeil is the sole owner of Appellees McNeil Consultants and Quintessa Marketing, both doing business as “Accident Injury Legal Center.” (ROA.93.) They both operate a lawyer-referral website at accidentinjurylegalcenter.com, as well as a call center associated with that site. (ROA.93.) Through that website and call center, those businesses solicit and refer personal injury cases to lawyers with whom they have a referral agreement, for which they receive referral fees. (ROA.93.)

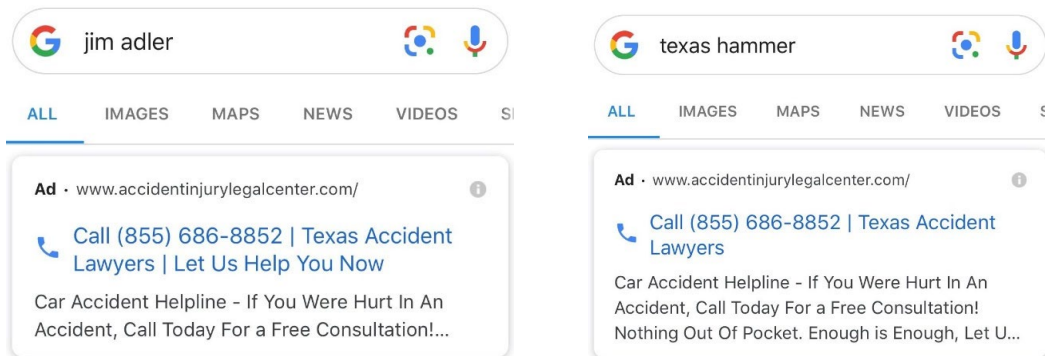
McNeil purchases the Adler Marks as keywords through Google's search engine on mobile devices, which Google then uses to serve click-to-call advertisements. (ROA.93.) The practice of buying a competitor's trademark as a search engine keyword has become common in the world of internet advertising,¹ and, the law is settled that this practice alone does not state a valid claim for trademark infringement. *See infra* at 23-28. The State Bar of Texas recently reviewed the practice and found that it does not violate Texas's attorney ethics rules. *See* Professional Ethics Committee for the State Bar of Texas, Opinion No. 661 (July 2016).

A "click-to-call" ad targets mobile devices; instead of linking to a website when the user taps on the ad, a click-to-call ad causes the device to call a predetermined phone number. (ROA.85 ¶9.) As a result, Google searches for "Jim Adler," "The Texas Hammer," and "El Martillo Tejano" result in search pages that display Defendants' ads. They are plainly

¹ *See* Daniel Malachowski, *Search Engine Trade-Marketing: Why Trademark Owners Cannot Monopolize Use of Their Marks in Paid Search*, 22 DEPAUL J. ART, TECH. & INTELL. PROP. L. 369, 369 (2012) (explaining that "[i]t is common for competitors ... to bid on others' marks.").

labeled—in bold—as ads. They indicate McNeil’s website as the source.

They do not contain Adler’s trademarks in whole or part:



(ROA.94 ¶¶44.)

Rather than identifying any specific lawyer or firm as the source, or displaying the Adler Marks, McNeil’s online click-to-call ads simply display generic terms that consumers might associate with any personal injury firm.

(ROA.193.) Consumers who select the click-to-call link are connected to a call center operated by McNeil. (ROA.194.)

B. This litigation

Adler sued, alleging federal-law claims for trademark infringement and unfair competition, along with related state-law causes of action. (ROA.84 ¶ 1.)² McNeil moved to dismiss. (ROA.115.)

After full briefing, Magistrate Judge David Horan issued findings of fact, conclusions of law, and a recommendation on August 10, 2020. (ROA.189.) He concluded that because Adler “failed to state a federal claim on which relief may be granted,” the district judge “should dismiss the federal claims in the amended complaint with prejudice and decline to exercise supplemental jurisdiction over the remaining state law claims.” (ROA.207.)

² That same day, Adler filed three other, similar lawsuits against other, unrelated parties. Two settled not long after filing: *Jim S. Adler PC et al. v. Alliance Injury Group LLC et al.*, No. 3:19-cv-2023-B (N.D. Tex.) (Boyle, J.), and *Jim S. Adler PC et al. v. Law Street Marketing LLC et al.*, No. 3:19-cv-2026-E (Brown, J.). In the third, Judge Kinkeade accepted Magistrate Judge Horan’s recommendation to dismiss Adler’s claims for misappropriation of name or likeness and misappropriation of business opportunity, and otherwise denied the defendants’ motion to dismiss. *Jim S. Adler PC et al. v. Angel L. Reyes & Associates PC*, No. 3:19-cv-02027-K-BN (N.D. Tex.). In that case—unlike this one—the resulting Google ads displayed the term “hammer,” a component of some Adler Marks. See *Adler v. Reyes*, 2020 WL 5099596 at *5 (N.D. Tex. Aug. 7, 2020), *adopted*, 2020 WL 5094678 (N.D. Tex. Aug. 29, 2020).

Adler objected and moved for leave to amend his complaint. (ROA.209, ROA.262.) Judge Ed Kinkeade denied the motion for leave, finding that the proposed amendment did not solve the substantive problems with Adler's claims. He otherwise adopted Magistrate Judge Horan's opinion, and entered judgment accordingly. (ROA.307, ROA.309.) This appeal followed. (ROA.310.)

Summary of the Argument

The trial court correctly dismissed Adler's complaint for two independent, mutually-reinforcing reasons.

Search term purchases. A well-established line of authority holds that the mere purchase of branded keywords to generate online ads does not violate the Lanham Act. The trial court correctly applied this line of authority to dismiss Adler's complaint. In so doing, it correctly refused to give any weight to Adler's conclusory allegations about a purported "scheme" by McNeil. Those allegations were insufficient to state a claim for "initial-interest confusion," or any other violation of federal trademark law.

Generic terms. McNeil’s ads do not display, contain, or otherwise refer to Adler’s trademarked terms. Adler sued about McNeil ads that contained generic terms that Adler admits may be associated “with any personal injury firm.” The trial court correctly held that the Lanham Act does not protect such generic terms, and properly dismissed Adler’s complaint for this additional reason.

Digits of confusion. After the district court concluded that Adler had failed to state a claim, it was not required to conduct an unnecessary “digits-of-confusion” analysis about that meritless claim. Because Adler did not allege any actionable misuse of a trademark or confusingly-similar term, there is nothing to analyze. Absent misuse of a trademarked term, or a confusingly-similar term in the text of the ad, there is simply no liability.

Amendment. The trial court did not abuse its discretion in denying Adler’s motion for leave to amend. The proposed amendment did not resolve the substantive problems with the dismissed complaint.

Argument

This court reviews de novo the trial court's ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *Basic Capital Mgmt., Inc. v. Dynex Capital, Inc.*, 976 F.3d 585, 588 (5th Cir. 2020). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[T]hreadbare factual allegations, along with ... conclusory recitation of the elements of a claim ... are insufficient to state a plausible claim for relief." *Waste Mgmt., Inc. v. AIG Specialty Ins. Co.*, 974 F.3d 528, 534 (5th Cir. 2020).

The trial court correctly applied two well-settled principles in dismissing Adler's complaint. *First*, the Lanham Act is not violated just by bidding on trademarked terms to generate internet search results. *Second*, the Lanham Act does not let a party claim a legal monopoly on common English-language words. Those principles are fatal to Adler's claim, whether

styled as one for “initial-interest confusion” or otherwise. The trial court’s dismissal should be affirmed.

A. The purchase of trademarked terms for use as search-engine keywords does not violate the Lanham Act.

Adler alleged that “[t]o carry out their scheme, Defendants purchase the ADLER Marks as keyword advertisements on mobile devices through Google’s search engine and uses [sic] them in connection with a ‘click-to-call’ advertisement.” (ROA.93 ¶43; *see also* ROA.94 ¶46 (describing the bidding process for such ads)). But the law is settled, both in this Circuit³ and nationally,⁴ that the mere act of buying a competitor’s trademark as a

³ *See College Network, Inc. v. Moore Educ. Publishers, Inc.*, 378 F. App’x 403, 414 (5th Cir. 2010) (clarifying that the purchase of a competitor’s brand as a search-engine keyword to summon sponsored-link advertising “does not compel a finding of likelihood of confusion under the relevant Fifth Circuit law”); *Tempur-Pedic N. Am., LLC v. Mattress Firm, Inc.*, Civil Action H-17-1068, 2017 WL 2957912, at *7-*8 (S.D. Tex. July 11, 2017) (“The mere purchase of AdWords alone, without directing a consumer to a potentially confusing web page, is not sufficient for a claim of trademark infringement.”); *see also Mary Kay v. Weber*, 661 F. Supp.2d 632, 646 (N.D. Tex. 2009) (Fish, J.) (refusing to enjoin a defendant from keyword bidding even after a finding of willful infringement).

⁴ *See, e.g., Alzheimer’s Disease & Related Disorders Ass’n, Inc. v. Alzheimer’s Found. Of Am., Inc.*, 307 F. Supp. 3d 260, 284 (S.D.N.Y. 2018) (“Virtually no court has held that, on its own, a defendant’s purchase of a plaintiff’s mark as a keyword term is sufficient for liability.”); (citing *1–800 Contacts, Inc. v. Lens.com, Inc.*, 755 F. Supp.2d 1151, 1174 (D. Utah 2010), *aff’d in part, rev’d in part on other grounds*, 722 F.3d 1229 (10th Cir. 2013); *Stephen T. Greenberg, M.D., P.C. v. Perfect Body Image, LLC*, 2019 WL 3485700, *7 (E.D. N.Y. 2019), report and

keyword for search-engine advertising does not state a valid claim for trademark infringement. Indeed, the principle is so well-settled that Google’s own trademark policy states: “We don’t investigate or restrict trademarks as keywords.”⁵

Adler admits the force of this authority. See Brief of Appellants [“Brief”] at 24 (“There is no dispute in this case that the mere purchase of a competitor’s mark for keyword searches (e.g., for comparative advertising) does not, in itself, give rise to trademark infringement.”). Unable to avoid those cases, Adler tried to evade them by talking about a “bait-and-switch scheme.” As the trial court correctly found, however, no such scheme is properly alleged—the record shows only “conclusory statements in

recommendation adopted, 2019 WL 3927367 (E.D. N.Y. 2019) (same); *Gen. Steel Domestic Sales, LLC v. Chumley*, No. 10-CV-1398, 2013 WL 1900562, at *10 (D. Colo. May 7, 2013), *aff’d*, 627 Fed. Appx. 682 (10th Cir. 2015) (the purchase of the term “general steel” as a search keyword so that searches incorporating that term would trigger the display of the defendant’s ads in the “sponsored links” section of the search results was not sufficient to support a trademark violation on the theory of initial interest confusion); *Hearts on Fire Co., LLC v. Blue Nile, Inc.*, 603 F.Supp.2d 274, 285 (D. Mass. 2009)); see also 5 J. THOMAS MCCARTHY, 5 MCCARTHY ON TRADEMARKS & UNFAIR Competition [“MCCARTHY”] § 25A:7 (5th ed. 2019) (“Almost all District Courts have found that no likelihood of confusion was caused by the purchase of keywords alone.”).

⁵ “Trademarks – Advertising Policies Help,” <https://support.google.com/adspolicy/answer/6118> (last visited Dec. 28, 2020).

[Adler's] complaint alleging that Defendants' advertisements are confusing" (ROA.201-ROA.202.)⁶ (This brief will address those allegations in more detail in Part (C), after reviewing the substance of the ads placed by McNeil.) The trial court correctly applied this line of cases to dismiss Adler's complaint. (ROA.201.)

On this point, Adler also cites two cases from this Court, both of which in fact support McNeil. The first is *College Network, Inc. v. Moore Educ. Publishers, Inc.*, 378 Fed. App'x 403, 414 n.5 (5th Cir. 2010), in which the jury found no infringement from defendant's purchase of the trademarked term "The College Network" as a search engine keyword for sponsored-link advertising. 378 Fed. App'x 403, 413. This Court affirmed, holding that "the evidence did not compel a finding of likelihood of confusion under the

⁶ In full, the trial court said: "The purchase of a competitor's trademark as a keyword for search-engine advertising, without more, is insufficient for a claim of trademark infringement. ... But that is precisely what Plaintiffs allege here. Although they make conclusory statements in their complaint alleging that Defendants' advertisements are confusing, they assert no facts to support those claims. And Plaintiffs seemingly concede so in their response. They make no substantive response to this issue but detour to address Defendants' one-paragraph argument that Plaintiffs did not state a false advertising claim. The undersigned acknowledges that Plaintiffs did not assert a claim for false advertising." (ROA.201-ROA.202 (citations omitted)).

relevant Fifth Circuit law.” *Id.* at 414 & n.5. The second, *Southwest Recreational Indus., Inc. v. FieldTurf, Inc.*, No. 01-50073, 2002 WL 32783971 (5th Cir. Aug. 13, 2002), also affirms a judgment based on a no-infringement verdict, noting: “The meta tag cases in which our sister circuits have found trademark infringement involve either evidence of customer confusion or evidence that the meta tags were used illegitimately.” *Id.* at *7-*8.

Importantly, when *Southwest Recreational* referred to a “meta tag,” it referred to part of the defendant’s website. A “meta tag” is a component in the code that, when executed, displays a website’s content to an observer.⁷

⁷ A “meta tag” is “an element of HTML that describes the contents of a Web page, and is placed near the beginning of the page’s source code, and used by search engines to index pages by subject.” Collins English Dictionary (2012 Digital Edition), <https://www.dictionary.com/browse/meta--tag> (last visited December 28, 2020). *See also*, e.g., “Meta element,” www.en.wikipedia.org/wiki/Meta_element (last visited January 7, 2021) (“Meta elements are tags used in [HTML](#) and [XHTML](#) documents to provide structured [metadata](#) about a [Web page](#). They are part of a web page’s ‘head’ section.”); “Meta Tags—How Google Meta Tags Impact SEO,” <https://tinyurl.com/y7uyqdx> (last visited January 7, 2021) [“Meta Tags”] (“Meta tags are snippets of text that describe a page’s content; the meta tags don’t appear on the page itself, but only in the page’s source code. Meta tags are essentially little content descriptors that help tell search engines what a web page is about.”); *see generally* “HTML—Meta Tags,” www.tutorialspoint.com/html/html_meta_tags.htm.”) (describing the kinds of information that a site’s meta tag can convey).

Like any other part of that source code, it can be seen with two mouse clicks.⁸

For two related reasons, the holdings of *College Network* and *Southwest Recreational* support the trial court's ruling. **First**, as a general matter, both cases require something more than conclusory claims about a "scheme" to make ad purchases actionable.⁹ True, *Southwest Recreational* acknowledged that "initial interest confusion" can establish a Lanham Act violation. *Id.* at *7 (citing *Elvis Presley Enterprises, Inc. v. Capece*, 141 F.3d 188 (5th Cir. 1988)). But nothing about that label changes the basic pleading requirements of the Federal Rules, which Adler failed to satisfy. *See infra* at 34-37.

⁸ See "Meta Tags," *supra* note 7 ("If you want to find out whether a given page is using meta tags, just right-click anywhere on the page and select 'View Page Source.' A new tab will open in Chrome (in Firefox, it'll be a pop-up window). The part at the top, or 'head' of the page, is where the meta tags would be."). For example, the 600Camp blog has this general information about the site in some of its meta tags:

```
<meta property="og:title" content="600 Camp - Commercial Litigation in the U.S. Court of Appeals for the Fifth Cir
<meta property="og:description" content="600 Camp reviews the Fifth Circuit's commercial litigation opinions.
<meta property="og:url" content="https://600camp.com/" />
<meta property="og:site_name" content="600 Camp" />
<meta name="twitter:card" content="summary_large_image" />
```

www.600camp.com (last visited Jan. 7, 2021).

⁹ Adler also cites *America CAN! v. Car Donations Foundation*, No. 3:18-CV-1709-G, 2019 WL 1112667 (N.D. Tex. March 11, 2019), which denied a 12(b)(6) motion for a complaint that "does not rely exclusively" on the purchase of trademarked terms. *Id.* at *9. The cited cases, consistent with the above authority from this Court, require something more. *Id.* *10. The trial court here correctly found that Adler did not do so. (ROA.201-ROA.202.)

Second, more specifically, these cases underscore the fact that this Circuit has not found “initial-interest confusion” when the ad in question does not contain the mark or a confusingly similar version of the mark. In the *Elvis Presley* case, this Court noted how a restaurant named the “Velvet Elvis” benefitted from customers who “thought the Defendants’ bar was a place that was associated with Elvis Presley” 141 F.3d at 204. In *Southwest Recreational*, this Court then acknowledged that precedent but found it inapplicable to the facts of that case. 2002 WL 32783971 at *7. And that discussion of meta tags was a discussion about the defendant’s incorporation of the mark into its allegedly-infringing website, as part of the website’s code. *See supra* at 26-27 & nn.7-8. In contrast, a keyword is not part of the disputed ad. *See supra* at 17-18. Adler cites no case from this Court that extends initial-interest confusion beyond an ad that in some way displays or incorporates the relevant mark, or something confusingly similar to that mark.

B. Displaying generic terms in ads does not violate the Lanham Act.

A trademark-infringement claim requires the plaintiff to “show that the defendant’s use of the mark ‘creates a likelihood of confusion in the minds of potential customers as to the source, affiliation, or sponsorship of the product or service at issue.’” *Alliance for Good Gov’t v. Coal. for Better Gov’t*, 901 F.3d 498, 508 (5th Cir. 2018) (citations omitted).¹⁰ For two related reasons, the trial court correctly found that Adler failed to plead a likelihood of consumer confusion.¹¹ As a result, no further analysis was required,

¹⁰ See also *Alliance*, 901 F.3d at 508 (“The required showing is a ‘probability’ of confusion, not merely a ‘possibility.’”) (emphasis added); see also *Viacom Int’l v. IJR Capital Investments, L.L.C.*, 891 F.3d 178, 192 (5th Cir. 2018) (“Word association with [claimant’s mark] is insufficient to establish a probable likelihood of confusion, and the court “must ‘consider the marks in the context that a customer perceives them in the marketplace.’” (quoting *Scott Fetzer Co. v. House of Vacuums Inc.*, 381 F.3d 477, 485 (5th Cir. 2004)).

¹¹ See, e.g., *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 613 (6th Cir. 2009) (affirming dismissal of trademark infringement suit even though the defendant’s advertising materials used the plaintiff’s trademark because the alleged facts demonstrated that there was no likelihood of confusion and that the fair use defense conclusively applied as a matter of law”); *Phoenix Entm’t Partners, LLC v. Casey Rd. Food & Beverage, LLC*, 728 F. App’x 910, 912–13 (11th Cir. 2018) (affirming dismissal of Lanham Act trademark infringement claim because there was no likelihood of confusion); *Anago Franchising, Inc. v. IMTN, Inc.*, 477 F. App’x 383, 386 (7th Cir. 2012) (same).

including any review of the “digits of confusion,” because there was nothing further to analyze. Adler’s complaint was correctly dismissed.

First, an ad is not likely to confuse a customer about a trademark when the ad does not display, contain, or otherwise refer to that trademark. *See, e.g., 1-800 Contacts*, 722 F.3d at 1242-49 (finding no likelihood of confusion and observing: “This case is readily distinguishable from [an earlier case] in which the alleged infringer used its competitor’s trademarks on its websites.”).¹² Here, it is undisputed that McNeil’s ads did not contain,

¹² *See also J.G. Wentworth, S.S.C. Ltd. P’ship v. Settlement Funding LLC*, CIV.A.06-0597, 2007 WL 30115, at *2, *8 (E.D. Pa. Jan. 4, 2007) (granting defendant’s motion to dismiss plaintiff’s trademark infringement claim under Lanham Act based on the court’s finding that there was no likelihood of confusion where the defendant’s ads and links did not incorporate the plaintiff’s trademarks in any way); *Infogroup, Inc. v. Database LLC*, 95 F. Supp. 3d 1170, 1191 (D. Neb. 2015) (denying motion for preliminary injunction based, in part, on no showing of a likelihood of confusion where the ads at issue did not use the plaintiff’s trademarks and the ad was plainly labeled as a sponsored ad); *USA Nutraceuticals Group, Inc. v. BPI Sports, LLC*, 165 F. Supp. 3d 1256, 1268 (S.D. Fla. 2016) (denying motion for preliminary injunction based on no likelihood of confusion where the defendant purchased the plaintiff’s trademarks as advertising keywords but the defendant’s ads did not display the trademarks); *Tartell v. South Florida Sinus & Allergy Center, Inc.*, No. 12-cv-61853, 2013 WL 12036430, at *6-7 (S.D. Fla. Jan. 28, 2013) (finding defendant’s use of plaintiff’s name in Google AdWords not confusingly similar because plaintiff’s name did not appear in ad, the ad was offset as a sponsored ads section, and the ad clearly identified defendant as the provider); *Zerorez Franchising Sys., Inc. v. Distinctive Cleaning, Inc.*, CV 13-2326 ADM/BRT, 2016 WL 2637801, at *8 n.3 (D. Minn. May 6, 2016) (noting that “because of the low likelihood of confusion resulting from

display, or otherwise refer to any term that Adler had trademarked. *See supra* at 17-18.

Second, Adler has no trademark claim about generic terms. Adler admits that his claims rest solely on the incorporation of “*generic* terms that consumers might associate with *any* personal injury firm” in McNeil’s ads. (ROA.94 ¶45 (emphasis added)). Adler has no valid trademark-infringement claim about ads that contain only generic terms. *See, e.g., Mil-Mar Shoe Co., Inc. v. Shonac Corp.*, 75 F.3d 1153, 1160 (7th Cir. 1996) (“Generic names are regarded by the law as free for all to use. They are in the public domain.”) (quoting 2 MCCARTHY § 12.01[2]).¹³ McNeil, like any other English speaker,

merely employing trademarked phrases in a non-customer facing environment [referring to Google Adwords campaigns], such behavior does not constitute trademark infringement.”).

¹³ *See, e.g., Am. Cyanamid Corp. v. Connaught Labs., Inc.*, 800 F.2d 306, 308 (2d Cir. 1986); *Scooter Store, Inc. v. SpinLife.com, LLC*, 2011 WL 6415516, at *1 (S.D. Ohio Dec. 21, 2011), *adhered to on denial of reconsideration*, 2012 WL 4498904 (S.D. Ohio Sept. 28, 2012); *Kegan v. Apple Computer, Inc.*, 1996 WL 667808, at *1 (N.D. Ill. Nov. 15, 1996). In *Kegan*, the owner of the registered mark “MacGuide” sued the defendant in connection with its use of the marks “Apple Guide” and “Macintosh Guide.” *Kegan*, 1996 WL 667808, at *1. The defendant argued that the suffix “--guide” is generic, such that the plaintiff was not entitled to prevent its use by others. *Id.* at *4. The court agreed, holding that the defendant “cannot be said to have infringed on [plaintiff’s] MACGUIDE trademark” where the generic term “--guide” is “not protectible and [defendant] should be able to use it freely.”

has “a right to the use of the English language and ... a right to assume that nobody is going to take that English language away from [her].” *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 122, n.5 (2004).¹⁴

Trying to skirt this principle and these cases, Adler relies on two cases involving the use of trademarks as meta tags to argue that trademark visibility is not a requirement for an infringement claim. See Brief at 30 (citing *Am. CAN!*, 2019 WL 1112667 at *9-10, and *Abraham v. Alpha Chi Omega*, 781 F. Supp. 2d 396 (N.D. Tex. 2011)). In both of these district-court cases, the defendants actively embedded the plaintiffs’ trademarks into the code of their website as meta tags. See *Am. CAN!*, 2019 WL 1112667 at *9-*10; *Abraham*, 781 F. Supp. 2d at 404. In other words, they took affirmative steps

Id. at *5, *8. The Court also noted that, although “guide” is a part of the plaintiff’s trademark Macguide, “Apple may use the term --GUIDE in a manner that conveys its primary meaning.” *Id.* at *8.

¹⁴ See also *Park ‘N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 201 (1985) (noting safeguards in Lanham Act to prevent commercial monopolization of language); *Car-Freshner Corp. v. S.C. Johnson & Son, Inc.*, 70 F.3d 267, 269 (2d Cir. 1995) (noting importance of “protect[ing] the right of society at large to use words or images in their primary descriptive sense”); *G.D. Searle & Co. v. Hudson Pharmaceutical Corp.*, 715 F.2d 837, 843 (3d Cir. 1983) (a trademark “does not confer a right to prohibit the use of the word or words.”).

to use and incorporate the trademarks in the allegedly-infringing websites. *See supra* at 26-27 & nn.7-8. In contrast, this case involves no use of Adler's marks beyond the mere purchase of keywords, which unlike meta tags, do not form part of the defendant's ads or website. *See supra* at 17-18.

The trial court correctly applied these principles to dismiss Adler's complaint. Adler does not cite any case in which trademark infringement was based on an ad that displayed only generic terms and did not display the plaintiff's mark.¹⁵ As a result, no further review of Adler's deficient pleading was required. In particular, the trial court was not required to conduct a pointless analysis of the "digits of confusion" when, as a matter of law, no likelihood of confusion was possible based on the facts alleged. *See Scooter Store, Inc. v. SpinLife.com, LLC*, 2011 WL 6415516, at *8, *13 (S.D. Ohio Dec. 21, 2011), *adhered to on denial of reconsideration*, 2012 WL 4498904 (S.D. Ohio Sept. 28, 2012) (holding that, because the defendant only purchased

¹⁵ This is why the Magistrate Judge in this case allowed the *Reyes* action to proceed in part. *See supra* at 19 n.2; *see also* Brief at 11, 12, 23. He concluded that the plaintiff's specific allegations in that case about use of the word "Hammer" were sufficient to state a claim (RPA.260); there are no such allegations in this case.

generic terms as Google AdWords, plaintiff's trademark infringement claims failed as a matter of law and required no likelihood-of-confusion analysis because generic terms "are not protectable and cannot infringe [plaintiff's] 'THE SCOOTER STORE' mark based on creating consumer confusion."').¹⁶

C. Adler's conclusory allegations about a "scheme" do not justify reversal.

Faced with strong adverse authority about McNeil's ad purchases, as well as the substance of McNeil's ads, Adler cites a series of conclusory allegations about a "scheme." *See, e.g.*, Brief at 23.¹⁷ The trial court correctly

¹⁶ *See generally Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 588 (1999) (noting that a district court may resolve a case on "a straightforward personal jurisdiction issue presenting no complex question of state law" rather than first addressing "a difficult and novel question" of subject-matter jurisdiction").

¹⁷ *See, e.g.*, Brief at 23 ("Adler alleges McNeil: (1) purchases the Adler Marks for internet advertisements targeting consumers searching for Adler on mobile devices because consumers are more likely to be confused in the mobile context; (2) uses the Adler Marks as keywords for deliberately vague ads with no source identifier so consumers searching for Adler will think McNeil's ad is associated with Adler; (3) uses click-to-call technology so as not to reveal the source of the ad and so that consumers searching for Adler will be confused and mistakenly call McNeil without realizing she is not Adler or associated with Adler; (4) bids increasing higher amounts so that her ads are placed immediately below the Adler Marks and before Adler's ads; and (5) has call-center operators follow scripts designed to further confuse callers seeking Adler in the hopes of keeping them on the phone, building rapport, and ultimately convincing them to hire lawyers referred through McNeil.").

rejected those allegations as inadequate under *Twombly* and *Iqbal* as interpreted by this Court. (ROA.201-ROA.202.). They provide no reason for reversal, for four reasons.

First, the amount of the bids used to generate the ads, as well as the click-to-call technology that supports them (points 3 and 4 on the list in Adler’s brief) are just part and parcel of the platform, which Adler conceded below was not at issue. (See ROA.154-ROA.155 (“But Adler is not claiming McNeil is merely purchasing Adler’s marks as keywords ...”). Nor does Adler cite to any authority, legal or otherwise, explaining why the incorporation of “click-to-call” technology makes any particular ad more or less likely to confuse customers, much less with regard to the misuse of a mark protected by the Lanham Act. See generally *Waste Mgmt., Inc. v. AIG Spec. Ins. Co.*, 974 F.3d 528, 534 (5th Cir. 2020) (finding pleading inadequate when, *inter alia*, “[plaintiff] did not allege that [defendant] failed to investigate, delayed any investigation, misevaluated, misprocessed, made any misrepresentation of the policy, or otherwise failed to ‘effectuate’ a fair settlement”).

Second, Adler does not allege any facts to support his conclusory allegation that McNeil’s ads are “confusing” just because they do not identify a particular lawyer or law firm (point 2 from Adler’s brief). This allegation simply restates Adler’s complaint about McNeil’s display of generic terms in her ads, which is not actionable. *See supra* at 23-28. The same is true for Adler’s related claim that “consumers are more likely to be confused in the mobile context” about the ads (point 1)—the generic terms of the ads are still not actionable, regardless of the user interface. Adler offers only speculation as to whether this interface makes the generic terms any more, or less, generic. *See Twombly*, 550 U.S. at 555 (“Factual allegations must be enough to raise a right to relief above the speculative level.”).

Third, Adler fails to allege any facts to support his allegation about misleading statements by McNeil’s “call-center operations” (point 1). Adler does not identify any actual misrepresentation made by such a person; to the contrary, Adler claims that they “build rapport” with callers, which is ordinarily considered desirable. And notably, Adler’s actual pleading of this allegation is “on information and belief” (ROA.95 ¶48), which this Court

cautions is not a “license to bae claims of fraud on speculation and conclusory allegations.” *Umbrella Ins. Group, LLC v. Wolters Kluwer*, 972 F.3d 710, 713 (5th Cir. 2020) (citation omitted)

These speculative allegations fail to state an actionable claim.

Fourth, while Adler claims that the scheme he alleges is “exactly the type of conduct” that some courts have recognized as supporting a claim of initial interest confusion (Brief at 14), the key cases he relies on are inapposite. For example, Adler cites *Earthcam, Inc. v. Oxblue Corp.*, 49 F. Supp. 3d 1210 (N.D. Ga. 2014), which in fact supports the trial court’s dismissal. In that case, the district court granted summary judgment on Oxblue’s trademark infringement claim that was based on EarthCam’s purchase of “oxblue” as a keyword – because Oxblue failed to address or present any evidence of a likelihood of confusion. *Id.* at 1241. Oxblue offered no evidence of the surrounding context of the screen displaying the disputed ads in the search results or “how often customers were lured to the Work Zone Cam’s website when they searched for OxBlue on the Internet.” *Id.* The “scheme” described by Adler’s pleading has the same deficiencies.

Adler also relies on *Alzheimer's Disease & Related Disorders*, but that case found that no likelihood of confusion was pleaded by allegations similar to Adler's. 307 F. Supp.3d at 284. That case gives an example of a "clearly actionable" bait-and-switch scheme, which is a far cry from what Adler alleged: "[I]f AFA had purchased Association Marks as keywords and then advertised itself as "Alzheimer's Association," with nothing in its ad to distinguish itself from the Association aside from its URL, this would be a clear case of infringement." *Id.* The key distinction is that McNeil does not "advertise itself" as Adler. Rather, by Adler's own admission, *see supra* at 31, McNeil's ads simply contain generic language that might describe any personal injury firm. Nothing about *Alzheimer's* supports reversal.

Finally, Adler cites *Australian Gold v. Hatfield*, in which the defendants "used Plaintiffs' trademarks on Defendants' Web sites," while also to using the plaintiff's trademarks in meta tags for its websites and to purchase a preferred position on Overture.com. 436 F.3d 1228, 1239 (10th Cir. 2006). The Tenth Circuit affirmed the trial court's finding of trademark infringement, but the record before that court was materially different than the one here,

and the court did not address whether infringement can occur when plaintiff's trademarks do not appear in defendant's ads or websites.¹⁸

In sum, rhetoric about a "scheme" is no substitute for an adequate pleading. The actual facts pleaded by Adler do not allege violations of the Lanham Act, whether labelled as "initial interest confusion" or otherwise. The trial court properly dismissed those purported claims and then properly declined to exercise supplemental jurisdiction over the remaining state-law claims.¹⁹

¹⁸ Adler cites two other, distinguishable, district-court cases. In *TSI Prods., Inc., v. Armor All/STP Prods., Co.*, No. 3:17-cv-1131, 2019 WL 4600310 at *6 (D. Conn. Sept. 23, 2019), the court found that TSI adequately pleaded its trademark infringement claim where the trademark was separated by a hyphen from the rest of Defendant Armor All's advertisement. McNeil's ads do not contain any of Adler's trademarks, hyphenated or otherwise. And in *Seguros R. Vasquez, Inc. v. Aguirre*, No. 19-CV-1484, 2020 WL 3447754, (D. Md. June 24, 2020), after recognizing that likelihood-of-confusion is "generally" a fact issue in the Fourth Circuit, the court held that the plaintiff adequately pleaded a claim for infringement "because he alleged "that the trademark infringement arises from *the use of that term in the text of the Google advertisement* that appears in response to a search based on that keyword. The use of a trademark in a Google advertisement, not just as a keyword search term, plainly can support a Lanham Act trademark infringement claim." *Id.* at *3 (emphasis added). In contrast, McNeil's search ads did not display Adler's trademarks.

¹⁹ "A district court's decision whether to exercise that jurisdiction after dismissing every claim over which it had original jurisdiction is purely discretionary." *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009); see 28 U.S.C. § 1367(c) ("The district courts may decline to exercise supplemental jurisdiction over a claim ... if ... the district court has dismissed all claims over which it has original jurisdiction.").

D. The trial court did not abuse its discretion in denying amendment.

“Denying a motion to amend is not an abuse of discretion if allowing an amendment would be futile. An amendment is futile if it would fail to survive a Rule 12(b)(6) motion.” *Marucci Sports, L.L.C. v. National Collegiate Athletic Ass’n*, 751 F.3d 368, 378 (5th Cir. 2014).

The trial court did not abuse its discretion in rejecting the proposed Second Amended Complaint. Adler repeats its argument about the claimed need for a digits-of-confusion analysis, and notes that the Second Amended Complaint added references to a customer survey that could be considered in such an analysis. *See* Brief at 43-45. Adler’s argument fails, however, because no such analysis should be conducted in the first place. A survey is not legally relevant—whether it shows confusion or not—if the alleged infringer is not in some way misusing the mark. *See supra* at 28-29.

As explained above, the trial court correctly found that no such misuse occurred. Accordingly, the trial court correctly held that when the Second Amended Complaint added allegations about a consumer survey, those allegations were not legally relevant because they did not solve the more

fundamental problem with Adler's case. (ROA.308) Put another way, Adler cannot bring a cow to a horse race and argue about how swiftly the cow might run on the track. The cow is still a cow.

Conclusion

For the foregoing reasons, this Court should affirm the judgment below, and grant all other relief to which Appellees may be entitled that is consistent with that disposition.

Respectfully submitted,

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Certificate of Service

The undersigned certifies that on January 8, 2021, the foregoing Brief was filed with the Clerk for the United States Court of Appeals for the Fifth Circuit, and that all counsel of record were served by electronic means on that same date.

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Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,916 words, excluding the parts of the brief exempted by Fed R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Palatino 14-point for text; 12-point for footnotes.

Date: January 8, 2021.

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